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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NANCY G. PERÉ, INDIVIDUALLY AND
ON BEHALF OF HER MINOR CHILDREN,
MATTHEW REED PERÉ and MARCI DANIELLE PERÉ,
Petitioner,

v.

NUOVO PIGNONE S.P.A.,
COPPUS ENGINEERING and TUTHILL CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the District Court's ruling that a foreign corporation can be an "agency or instrumentality of a foreign state" under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*, even though the majority of its shares were never held directly by a foreign state or a political subdivision thereof.

2. Whether the Court of Appeals erred in holding that a foreign corporation may claim sovereign immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*, notwithstanding the foreign state's divestiture of its ownership interest prior to the commencement of the litigation.*

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* Respondents take no position regarding whether a writ of certiorari should be issued to review the third and fourth issues raised in the Petition; *i.e.*, the application of the "commercial activities" exception (28 U.S.C. § 1605(a)(2)); and the waiver of sovereign immunity through the execution of contracts containing arbitration and choice of law clauses.

LIST OF PARTIES

Plaintiff-Appellee below was Nancy G. Peré, the wife of Marcus Peré and the mother of their children, Matthew Reed Peré and Marci Danielle Peré. Defendant-Appellant was Nuovo Pignone, S.p.A. Coppus Engineering and Tuthill Corporation were Defendants-Appellees in the proceedings before the United States Court of Appeals for the Fifth Circuit.

Tuthill Corporation, a Massachusetts corporation, is the successor-in-interest to Coppus Engineering. Tuthill Corporation does not have a parent corporation or any subsidiaries other than those wholly-owned.

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RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondents, Coppus Engineering and Tuthill Corporation (collectively referred to as "Tuthill"), respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 150 F.3d 477 (5th Cir. 1998) and is reprinted in the Appendix to Petitioner's brief ("Pet. App.") at A1. The Memorandum Ruling and Order of the United States District Court for the Western District of Louisiana, Lafayette-

Opelousas Division, are not reported, and are reprinted in Pet. App. at B1.

JURISDICTION

On April 29, 1997, the District Court entered its Memorandum Ruling and Order, holding that Respondent, Nuovo Pignone, S.p.A. ("Nuovo Pignone"), was not immune from suit under the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976), codified at 28 U.S.C. §§ 1330, 1602-1611, and amendments to 28 U.S.C. §§ 1332, 1391 and 1441 ("FSIA"). Pet.App. B1. On August 7, 1998, the United States Court of Appeals for the Fifth Circuit affirmed in part and reversed in part the District Court's decision. Pet. App. A1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the interpretation and application of the FSIA. The specific provisions relied upon by Petitioner (28 U.S.C. §§ 1602, 1603 and 1605) are reprinted in the Appendix to the Petition at G1. Tuthill submits that, in addition to the provisions cited by Petitioner, 28 U.S.C. § 1604, entitled "Immunity of a foreign state from jurisdiction," is at issue in this case. The Statute provides:

> **Immunity of a foreign state from jurisdiction**
>
> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts.

STATEMENT AND INTRODUCTION OF THE CASE

This case presents a confluence of two highly-contested issues relating to the interpretation and application of the FSIA: (1) whether a corporation can be an "agency or instrumentality of a foreign state," even though the ma-

jority of its shares were never held directly by a foreign state or a political subdivision thereof (*i.e.*, the "tiering" of ownership); and (2) whether a corporation may claim sovereign immunity notwithstanding the foreign state's divestiture of its ownership interest prior to the commencement of the litigation (i.e., the "timing" of ownership). Sharp splits amongst the Circuit Courts of Appeals have developed with respect to each of these issues. The divisions that currently exist frustrate the FSIA's stated purpose of bringing "uniformity in decision" to the determination of foreign sovereign immunity. H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611 (1976).[1] *See* Res. Sup. App. 13a.

The importance of these issues cannot be overstated. The disparate treatment of foreign governments resulting from the inconsistent application of principles of foreign sovereign immunity can have adverse consequences on the United States' relations with other countries. *Id.* Moreover, with the globalization of the economy, American citizens, like Marcus Peré, have and will continue to "[come] into greater contact with foreign states. . .," *id.* at 2a, thereby confirming that, in the future, the lower courts will continue to be confronted with these issues. Further, a decision to grant sovereign immunity is outcome-determinative and effectively serves to deny plaintiffs, like the Petitioner, of a forum in which to present their claims and to be compensated for their losses. If left in its place, the Fifth Circuit's decision would compound the conflicts that have arisen in the lower courts, would potentially adversely impact foreign relations, and would lead to additional uncertainty regarding the rights of American citizens in their interactions with foreign entities.

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[1] H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604 (1976), is set forth in the Respondents' Supplemental Appendix ("Res.Sup.App.") at 1a.

I. Factual Background

This lawsuit arises out of an accident that occurred off the coast of Angola on October 16, 1993. On that date, Marcus Peré, an instrument technician employed by Chevron Overseas Petroleum and/or Cabinda Gulf Oil Co. ("CABGOC"), was administering tests on a gas turbine system installed on a gas injection platform ("GIP-FOX"), when a starter turbine allegedly exploded, killing Peré. Pet. App. A2.

The starter turbine was purchased in 1974 from Coppus Engineering by AGIP USA, Inc. ("AGIP"), on behalf of Nuovo Pignone, an Italian company that designs and manufactures turbine systems. In 1979, almost five (5) years after it was purchased, Nuovo Pignone entered into an agreement with CABGOC for the sale of a turbine system that incorporated the starter turbine. Pet. App. A2; B2-B3. Nuovo Pignone manufactured, tested and inspected the parts of its turbine system in Italy. The parts then were shipped to Bayou Black, Louisiana for final manufacturing and assembly onto the gas injection platform. Nuovo Pignone personnel assisted in and supervised the installation of the turbine system onto the platform. Pet. App. A2; B3. After the turbine was assembled, the completed platform was shipped to CABGOC in the Molongo Field near Cabinda, Angola. Pet. App. A2.

At the time of the accident, the majority of Nuovo Pignone's shares were owned by Ente Nazionale Idrocaburi ("ENI"), a joint stock company. The Minister of Treasury of the Republic of Italy owned 100% of the shares of ENI. Following the accident, but prior to the commencement of the instant action, ENI transferred its majority interest in Nuovo Pignone to a consortium of private companies, led by General Electric. Pet. App. A4; B4.

II. Procedural History

A. Proceedings Before the District Court

The wife and children of Marcus Peré (collectively referred to as "Peré") commenced the instant action seeking to recover damages for the alleged wrongful death of Marcus Peré. Named as defendants were, *inter alia*, Nuovo Pignone, Coppus Engineering, and Tuthill Corporation. Peré claimed that the defendants defectively designed and/or manufactured the turbine system that allegedly exploded and caused the death of Marcus Peré. Pet. App. A1; B2.

Following discovery limited to jurisdictional issues, Nuovo Pignone moved for summary judgment, claiming that it was entitled to sovereign immunity under the FSIA. Specifically, Nuovo Pignone contended that, at the time of the events complained of, Nuovo Pignone was an agent or instrumentality of the Italian government and, therefore, was a "foreign state" entitled to immunity. Pet. App. A3; B4-B5. Peré filed a cross-motion for summary judgment, asserting that Nuovo Pignone was not an agent or instrumentality of Italy, because: (1) a majority of Nuovo Pignone's shares were not owned directly by the foreign state or a political subdivision thereof, as required under 28 U.S.C. § 1603(b) (the "tiering" issue); and (2) Italy did not have an ownership interest in Nuovo Pignone on the date the action was commenced (the "timing" issue). Peré further asserted that, even assuming *arguendo*, Nuovo Pignone was an agent or instrumentality of Italy, it was not entitled to sovereign immunity pursuant to 28 U.S.C. § 1605, as the lawsuit arose out of Nuovo Pignone's commercial activities in the United States. Pet. App. B4-B5.[2]

Treating the cross-motions for summary judgment as a motion to dismiss by Nuovo Pignone for lack of subject-

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[2] Tuthill filed in the District Court a memorandum opposing Nuovo Pignone's motion and supporting the cross-motion filed by Peré.

matter jurisdiction pursuant to Rule 12(b)(1), Fed. R. Civ. P., and an opposition thereto filed by Peré, the District Court held that Nuovo Pignone was not entitled to sovereign immunity. Pet. App. B5; B19. Recognizing that the effect of the tiering of ownership was a "difficult issue" over which the Circuit Court of Appeals had split, the District Court ruled that entities indirectly owned by a foreign state are agencies or instrumentalities of the foreign state. Pet. App. B9-B14. The District Court reasoned that the existence of ENI, the intermediary joint stock company, did not necessarily lessen Italy's control of Nuovo Pignone, because ENI was owned 100% by the Minister of Treasury of the Republic of Italy. The District Court acknowledged that a different result might be warranted if the foreign state held only a bare majority of the shares of an intermediary corporation that, in turn, held a bare majority of the shares of another entity. Pet. App. B13-B14.

The District Court also held that whether an entity is a foreign state should be considered as of the time of the events giving rise to the lawsuit, rather than the time of filing. The District Court reasoned that the foreign policy concerns of the FSIA do not necessarily dissipate once an entity is no longer controlled by the foreign state. Pet. App. B15. Accordingly, the District Court concluded that Nuovo Pignone qualified as a foreign state under the FSIA. Pet. App. B16.

Nonetheless, the District Court held that Nuovo Pignone was not entitled to sovereign immunity, as the "commercial activities" exception set forth in 28 U.S.C. § 1605(a)(2) applied. Specifically, the District Court determined that Nuovo Pignone's shipment of the gas turbine system to Louisiana and dispatch of representatives to Louisiana to supervise and/or consult in the assembly of the component parts of the turbine system constituted commercial acts in the United States with a "material connection" to Peré's cause of action. Pet. App.

B16-B19. As a result, the District Court denied Nuovo Pignone's motion to dismiss. Pet. App. B19.

B. The Fifth Circuit's Ruling

The United States Court of Appeals for the Fifth Circuit affirmed in part and reversed in part the District Court's ruling. The panel held that Nuovo Pignone was a foreign state under the FSIA, notwithstanding the change in ownership prior to the commencement of the action, reasoning that "courts are to look at the defendant's status at the time the litigated events occurred." Pet. App. A5. Like the District Court, the panel reasoned that "the foreign policy concerns underlying sovereign immunity do not necessarily disappear when a defendant loses its foreign status before suit is filed." Pet. App. A5 (citing *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993)).[3]

The panel reversed the District Court's ruling that the commercial activities exception applied. Pet. App. A6-A9. Specifically, the panel concluded that Peré had failed to establish a "material connection" between Nuovo Pignone's act of sending representatives to Louisiana to supervise and/or consult in the final assembly of the component parts of the turbine system onto the platform and Peré's wrongful death action, premised upon allegations of wrongful design and/or manufacturing. Pet. App. A8-A9.

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[3] The panel affirmed the District Court's decision that Nuovo Pignone was a foreign state without specifically discussing the tiering issue addressed by the District Court.

REASONS FOR GRANTING THE PETITION

I. A SHARP CONFLICT EXISTS AMONG THE CIRCUITS REGARDING WHETHER A CORPORATION IS AN "AGENCY OR INSTRUMENTALITY OF A FOREIGN STATE," EVEN THOUGH THE MAJORITY OF ITS SHARES WERE NEVER HELD DIRECTLY BY A FOREIGN STATE OR ITS POLITICAL SUBDIVISION

There is a deeply-rooted conflict among the Circuits concerning whether the immunity granted under the FSIA extends to second-tier corporate subsidiaries. The Ninth Circuit has ruled that a corporation is not an "agency or instrumentality of a foreign state" if a majority of its shares are not directly owned by the foreign state or a political subdivision thereof. The Fifth, Sixth, Seventh and District of Columbia Circuits have held the opposite. An analysis of the leading cases from the Circuits is set forth below.

A. A Second-Tier Corporate Subsidiary is not an "Agency or Instrumentality of a Foreign State"

Ninth Circuit

The Ninth Circuit considered whether sovereign immunity should be granted to second-tier corporate subsidiaries of foreign states in *Gates v. Victor Fine Foods,* 54 F.3d 1457 (9th Cir.), *cert. denied,* 516 U.S. 869 (1995). In *Gates*, the Defendant, Fletcher's Fine Foods ("FFF"), was a wholly-owned subsidiary of Alberta Pork, a Canadian entity established by Alberta law to promote the province's pork industry. After determining that Alberta Pork was an "agency or instrumentality of a foreign state," the Ninth Circuit concluded that the express language of 28 U.S.C. § 1603 precluded a finding that FFF, the second-tier subsidiary, was also an "agency or instrumentality of a foreign state":

> To be an "agency or instrumentality," the entity must either be an "organ of a foreign state" or have a

> majority of its shares owned by a "foreign state or political subdivision thereof." 28 U.S.C. § 1603(b) . . . FFF is wholly owned by an agency or instrumentality of a foreign state; however, FFF is not owned by a "foreign state or political subdivision thereof," as required by the statute.

Id. at 1462.

The Ninth Circuit rejected FFF's argument that its parent, Alberta Pork (itself "an agency or instrumentality of a foreign state"), was a "foreign state or political subdivision thereof":

> . . . [T]he literal language of the statute requires us to reject that argument. First, the statute provides that a foreign state includes an agency or instrumentality, not that it is an agency or instrumentality or that it is defined as an agency or instrumentality. Second, the remainder of the statute contradicts any interpretation that would equate "an agency or instrumentality" with "a foreign state." If Congress had intended "agencies or instrumentalities of a foreign state" to mean "a foreign state" for the purposes of section 1603, then it also would have intended a "political subdivision" to mean "a foreign state" because section 1603(a) defines a foreign state as including both "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." The statutory language strongly indicates that Congress did not intend this interpretation, however, because the remainder of the section differentiates between "foreign states" and "political subdivisions thereof" . . .
>
> Moreover, the legislative history repeatedly draws the same distinction. In the House Report Congress stated:
>
> > The second criterion [of § 1603(b)] requires that the entity be either an organ of a foreign state (or of a foreign state's political subdivision), or that a majority of the entity's shares or other ownership interest be owned by a for-

> eign state (or by a foreign state's political subdivision). If such entities are entirely owned by a foreign state, they would of course be included within the definition. Where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision. 1976 U.S.C.C.A.N. 6604, 6614 (emphasis added).

Gates, 54 F.3d at 1462.

The Ninth Circuit refused to expand the scope and reach of the Statute beyond the limitations imposed by its express language:

> Indeed, our reluctance to put words in Congress' mouth is especially justified here because Congress seemed exceedingly conscious of the distinction between foreign states, political subdivisions, and agencies or instrumentalities of foreign states and political subdivisions. It could easily have stated that an entity must be owned by a foreign state, a political subdivision or an agency or instrumentality of a foreign state or poliitcal subdivision. It did not. Moreover, a contrary reading of the statute could expand immunity far beyond what Congress intended. As it is written, the Act provides potential immunity to entities that are either organs of a foreign state or political subdivision thereof or have a majority of shares owned by the foreign state or political subdivision. To add to that list entities that are owned by an agency or instrumentality would expand the potential immunity considerably because it would provide potential immunity for every subsidiary in a corporate chain, no matter how far down the line, so long as the first corporation is an organ of the foreign state or political subdivision or has a majority of its shares owned by the foreign state or political subdivision. Although such a broad view

> of soverign immunity may very well be desirable, we cannot assume that Congress intended such a result when a literal reading of the statute leads to the opposite conclusion.

Id. at 1462 (internal footnotes omitted). The Ninth Court has adopted a bright-line rule that sovereign immunity is not to be extended to second-tier subsidiaries.[4]

B. A Second-Tier Corporate Subsidiary is an "Agency or Instrumentality of a Foreign State"

Seventh Circuit

The Seventh Circuit reached the opposite conclusion in *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*, 96 F.3d 932 (7th Cir. 1996). The Defendant, Avions de Transport Regional, G.I.E. ("ATR"), was a subsidiary of two (2) European commercial aerospace companies, the majority of whose shares were owned respectively by France and Italy. *Id.* at 935-36. In ruling that, notwithstanding the *Gates* decision, a second-tier subsidiary of a foreign state may be an "agency or instrumentality" of the foreign state, the Seventh Circuit reasoned:

> The plain language of § 1603(a) defines "foreign state" broadly. The House Report's analysis of that statute confirms this broad definition set out in the statute. . . . There, the committee specified that § 1603(a)'s definition of "foreign state" applied to all provisions in the Act except § 1608, where it referred only to a foreign sovereign. This distinction is again made in 28 U.S.C. § 1611(b) (". . . the property of a foreign state shall be immune from

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[4] Although the issue has not been addressed specifically by the Second Circuit, two (2) District Courts in the Circuit, following *Gates*, have ruled that the FSIA does not apply to companies majority-owned by a foreign state's agency or instrumentality. *Hyatt Corp. v. Stanton*, 945 F.Supp. 675 (S.D.N.Y. 1996); *Gardiner Stone Hunter Int'l v. Iberia Lineas Aeras de Espana, S.A.*, 896 F.Supp. 125 (S.D.N.Y. 1995).

> attachment and from execution, if—(1) the property is that of . . . its parent foreign government. . . ."). To limit "foreign state" to "foreign sovereign" or "foreign government" would be to rewrite the Act, which is obviously beyond our role as judges. . . The use of "includes" shows Congress' intent to broadly define "foreign state." This is consistent with the statement in the legislative history that instrumentalities could assume "a variety of forms" . . ., including "a transport organization such as an . . . airline."

Id. at 940 (internal citations omitted). *See also Ocasek v. The Flintkote Co.*, 796 F.Supp. 362 (N.D.Ill. 1992) (fourth-tier corporate subsidiary qualified as an "agency or instrumentality of a foreign state").

Fifth Circuit

In the instant action, the Fifth Circuit affirmed the District Court's ruling that ENI's ownership of a majority of Nuovo Pignone's shares did not preclude extension of sovereign immunity. *See also Linton v. Airbus Industrie*, 30 F.3d 592, 598 n.2 (5th Cir.) ("The controlling statute . . . erects no explicit bar to the methods by which a foreign state may own an instrumentality. . . . There is no mention of 'voting' or 'control' majority, thus equitable or beneficial majority ownership is not expressly prohibited from serving"), *cert. denied*, 513 U.S. 1044 (1994).

Sixth Circuit

In *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105 (6th Cir. 1995), the defendant was a subsidiary of Societe National de L'Amiante, a Crown Corporation of Canada. In determining whether Atlas was required to be served pursuant to 28 U.S.C. § 1608(e), the Sixth Circuit concluded that the second-tier subsidiary was "an instrumentality of a foreign state." *Id.* at 109.

District of Columbia Circuit

Gilson v. Republic of Ireland, 682 F.2d 1022 (D.C. Cir. 1982), was an action brought against the Republic of Ireland and three (3) Irish corporations. The panel ruled that an entity wholly-owned by an instrumentality of the government of the Republic of Ireland qualified as a "foreign state." *Id.* at 1026 n.19. *See also Millicom Int'l Cellular, S.A. v. Republic of Costa Rica,* 995 F.Supp. 14, 18 n.5 (D. D.C. 1998) (an entity that is "majority owned by a foreign state" includes an entity majority owned by an agency or instrumentality of a foreign state) (citing *Gilson* and *Air Crash Disaster Near Roselawn, Indiana*).

C. The Split in the Circuits Should Be Resolved in Favor of a Bright-Line Rule That Sovereign Immunity Does Not Extend to Second-Tier Subsidiaries

The bright-line rule that second-tier subsidiaries may not claim sovereign immunity is consistent with the express language of the Statute. As the Ninth Circuit ruled in *Gates,* under 28 U.S.C. § 1603(b)(2), a corporation is an "agency or instrumentality of a foreign state" only if a majority of its shares or other ownership interest is owned directly by a foreign state or a political subdivision thereof. *Gates,* 54 F.3d at 1462. The express language of the FSIA does not extend immunity to corporations that are not directly owned by the foreign state or a political subdivision thereof.

Extension of immunity to second-tier subsidiaries also would contravene international law. The prevailing international rule as to corporations owned by foreign states is the "separate entity" rule: entities with separate legal personalities are presumed not to possess sovereign immunity. *See* William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity*

Purposes?, 65 Tul. L. Rev. 535, 542-65 (1991), and cases cited therein. The presumption can be overcome only if the entity establishes that it was performing sovereign functions. *Id.* at 542-43. In enacting the FSIA, Congress deviated from the separate entity rule (still followed by most other foreign states) and extended immunity only to entities owned by a foreign state and its political subdivisions. As the Ninth Circuit stated in *Gates*:

> Congress seemed exceedingly conscious of the distinction between foreign states, political subdivisions, and agencies or instrumentalities of foreign states and political subdivisions. It could easily have stated that an entity must be owned by a foreign state, a political subdivision or an agency or instrumentality of a foreign state or political subdivision. It did not.

Gates, 54 F.3d at 1462.

A decision to extend sovereign immunity to second-tier corporations also creates a "slippery slope." If the requirement that the foreign state must directly own a majority of a corporation's shares is eliminated, the FSIA, theoretically, could apply to every subsidiary of a corporation (*i.e.*, third-, fourth- or tenth-tier subsidiaries). There would be no limit on how far removed a corporation could be from sovereign control, yet still be covered under the FSIA. There is no indication that Congress intended such a result. Thus, a corporation whose shares are not directly owned by the foreign state should not be granted immunity under the FSIA.

II. THE CIRCUITS ARE DIVIDED AS TO WHETHER A CORPORATION MAY CLAIM SOVEREIGN IMMUNITY, NOTWITHSTANDING THE FOREIGN STATE'S DIVESTITURE OF ITS OWNERSHIP INTEREST PRIOR TO THE COMMENCEMENT OF THE LITIGATION

The statutory definition of a "foreign state," 28 U.S.C. § 1603(a), does not specifically address the temporal

reference that should be considered in determining whether an entity is a foreign state. In the absence of statutory guidance, the lower courts have adopted and employed divergent rules. The Ninth Circuit looks to the time that the lawsuit was commenced in assessing whether an entity is a foreign state under 28 U.S.C. § 1603(a). The Third, Fifth, Sixth, Eighth and Eleventh Circuits are in conflict with this interpretation, concluding that the appropriate reference point is the time of the underlying events.

A. Whether an Entity Is a Foreign State Should Be Determined as of the Date the Lawsuit Was Commenced

In *Straub v. Atlas Turner, Inc.*, 38 F.3d 448 (9th Cir. 1994), the defendant was not owned by the foreign state at the time of the acts giving rise to the lawsuit. The Ninth Circuit held that the FSIA "is applicable when a party is a foreign state at the time the lawsuit is filed, even if that party was not a foreign state at the time of the alleged wrongdoing." *Id.* at 451.[5]

B. Whether an Entity Is a Foreign State Should Be Determined as of the Date of the Occurence of the Events Underlying the Lawsuit

Sixth Circuit

The Sixth Circuit's holding in *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir. 1988), is inconsistent with the Ninth Circuit's ruling in *Straub*. In *Gould*, one of the defendants wah privatized during the pendency

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[5] The District Court in *Ocasek v. The Flintkote Co.*, 796 F.Supp. 362 (N.D. Ill. 1992), similarly ruled that the time period to be referenced to assess whether an entity is a foreign state is the date the complaint was filed, because subject matter jurisdiction must exist as of that date. *But see Leith v. Lufthansa German Airlines*, 897 F.Supp. 1115 (N.D. Ill. 1995) (privatization of corporation subsequent to accrual of cause of action did not deprive the court of jurisdiction).

of the appeal. Nonetheless, the Sixth Circuit held that it was entitled to immunity:

> The subject matter jurisdiction granted to the district courts by the FSIA in 28 U.S.C. § 1330(a) . . . is neither diversity nor alienage jurisdiction, but federal question jurisdiction. . . . It would appear that the determination of whether a party is subject to the court's jurisdiction under 28 U.S.C. § 1330(a) should be based upon a party's status at the time the act complained of occurred. . . As to completed acts upon which the complaint is based, the parties are bound by the jurisdictional facts existing at the time of those acts.

Id. at 450 (internal citations and footnotes omitted).

Eighth Circuit

Following *Gould,* the Eighth Circuit, in *General Electric Capital Corp. v. Grossman,* 991 F.2d 1376 (8th Cir. 1993), held that Air Canada was a "foreign state" under the FSIA, even though it had been privatized prior to the filing of the lawsuit. In reaching its conclusion, the panel determined that the use of the present tense in the FSIA and the House Report to define an "agency or instrumentality of a foreign state" did not establish a congressional intent that immunity be accorded only if an entity is a foreign state at the time a lawsuit is commenced, because "the use of the word 'is' could speak to a variety of situations, including the time of the alleged wrongdoing." *Id.* at 1381. The panel further reasoned that the "foreign policy concerns discouraging [courts] from judging the acts of another nation are not necessarily eliminated because an entity is not a foreign state at the time of suit." *Id.*

The Eighth Circuit rejected the argument that the laws governing diversity jurisdiction, diplomatic immunity and the act of state doctrine provide immunity only when the entities have the required status when the lawsuit is commenced and, accordingly, supported a finding that an

entity's status as a foreign state should be determined as of the time of suit. *Id.* at 1381-82. The panel reasoned:

> "Diversity jurisdiction exists to protect out-of-state litigants from state court bias." . . . Thus, it is consistent that the party's status at the time of suit controls for the purpose of determining whether diversity jurisdiction exists. Unlike the underlying purpose of diversity jurisdiction, the foreign policy considerations underlying sovereign immunity are not necessarily eliminated when the defendant loses its status as a foreign state before the time of filing suit. Diplomatic immunity and sovereign immunity, on the other hand, share the similar objective of protecting governmental decisions from judicial scrutiny. . . . Diplomatic immunity, however, is not necessarily lost when a person loses his diplomatic status before the time of filing suit. Thus, the law of diplomatic immunity does not support [Plaintiff's] interpretation of the Act. The act of state doctrine is also driven by comity concerns between existing sovereigns. . . The cases cited by appellant interpreting the act of state doctrine do not say that the defendants' status at the time of suit controls for the purpose of determining whether the act of state doctrine applies. . .

Id. (internal citations omitted). In sum, the Eighth Circuit found dispositive that the lawsuit concerned the conduct of the entity when it was an "agency or instrumentality" of the foreign state.

Fifth Circuit

In the instant action, the Fifth Circuit held that "courts are to look at the defendant's status at the time the litigated events occurred." Pet. App. A5. Following the Eighth Circuit's ruling in *General Electric,* the panel reasoned that "the foreign policy concerns underlying sovereign immunity do not necessarily disappear when a defendant loses its foreign status before suit is filed." Pet. App. A5.

Third Circuit

The Third Circuit's ruling in *Fidelity & Casualty Co. v. Texas Eastern Transmission Corp.*, 15 F.3d 1230 (3rd Cir.), *cert. denied*, 513 U.S. 915 (1994), similarly provides that the time for determining whether an entity is a foreign state is the time of the underlying events. In *Fidelity & Casualty Co.*, the panel noted that the FSIA did not apply, because the defendant was not a foreign state at the time it entered into the contracts at issue. *Id.* at 1244.

Eleventh Circuit

The Eleventh Circuit also has ruled that the time period to be referenced in determining whether an entity is a foreign state is the time of the underlying events. *In re Chase & Sanborn Corp.*, 835 F.2d 1341, 1347-48 (11th Cir. 1988) (concluding that the FSIA was inapplicable because the entity was not an instrumentality of the foreign state at the time of the transactions at issue), *rev'd on other grounds, Granfinanciera, S.A. v. Norberg*, 492 U.S. 33 (1989).

C. The Split in the Circuits Should Be Resolved in Favor of a Rule that an Entity Must Be a Foreign State During the Pendency of the Lawsuit

Requiring an entity to be a "foreign state" during the pendency of the lawsuit is consistent with the express language of the Statute and the underlying House Report. Both define the phrase "agency or instrumentality of a foreign state" by using only the present tense. *See* 28 U.S.C. § 1603(b) ("an 'agency or instrumentality of a foreign state' means an entity—(1) which *is* a separate legal person . . .; (2) which *is* an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest *is* owned by a foreign state or political subdivision thereof; and (3) which *is* [not] a citizen of a State of the United States . . .); Res.

Sup.App. 17a ("The first criterion, that the entity *be* a separate legal person, is intended to include a corporation . . . The second criterion requires that an entity *be* either an organ of a foreign state . . ., or that a majority of the entity's shares or other ownership interest *be* owned by a foreign state. . . . The third criterion excludes entities which *are* citizens of a State of the United States") (emphasis supplied). In contrast, later provisions of the FSIA expressly differentiate between the past and present tense. *See, e.g.*, 28 U.S.C. § 1610(a)(1) (establishing an exception to immunity from attachment or execution for property in the United States, if "the property *is or was* used for the commercial activity upon which the claim is based); 28 U.S.C. § 1610(b)(1) (establishing an exception to immunity from attachment or execution for property of an agency or instrumentality of a foreign state if "the judgment relates to a claim for which the agency or instrumentality is not immune . . ., regardless of whether the property *is or was* involved in the act upon which the claim is based") (emphasis supplied).

Congress recognized a distinction between the present (*i.e.*, the time of suit) and the past (*i.e.*, the time of underlying acts) in drafting the FSIA. The absence of any use of the past tense in the statutory definition of an "agency or instrumentality of a foreign state," indicates that Congress intended that the assessment of whether a defendant is a "foreign state" be determined in reference to the pendency of the suit. *See Dickerson v. New Banner Institute*, 460 U.S. 103, 116 (1983) ("[The] use of the respective tenses is significant and demonstrates that Congress carefully distinguished between present status and a past event"). *Contra General Electric Capital Corp. v. Grossman*, 991 F.2d 1376, 1381 (8th Cir. 1993).

Moreover, although the privatization of an entity after the occurrence of the underlying events does not eliminate the need to review the prior acts of the foreign state, it does minimize the likelihood that foreign relations could

or would be strained as a result of the lawsuit. Only the presence of a foreign state during the pendency of the suit raises the possibility that a judgment would be entered directly against the foreign state and that the plaintiffs would seek to execute the judgment against state property. The foreign policy concerns raised in cases against corporations owned by foreign states far exceed any that may potentially be involved in suits against entities that are owned by private investors during the pendency of the lawsuit.[6] Accordingly, a corporate defendant should be entitled to claim sovereign immunity only if it is a foreign state during the pendency of the lawsuit.

III. THE ISSUES RAISED ARE IMPORTANT AND SHOULD BE RESOLVED AT THIS TIME

In addition to augmenting the conflicts that have arisen among the Circuit Courts, the Fifth Circuit's ruling in this case unnecessarily broadens the scope and reach of the FSIA. The FSIA was drafted by Congress to "[codify] the so-called 'restrictive' theory of foreign sovereign immunity."[7] *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612 (1992); Res.Sup.App. 3a. In adopting the restrictive theory, Congress attempted to strike a delicate balance between two (2) competing interests: (1) the need to establish procedural safeguards for foreign states engaged in sovereign activities; and (2) the need to provide a procedural mechanism for plaintiffs to seek redress for injuries suffered as a result of the private or commercial acts of a foreign state. Res.Sup.App. 2a-3a.

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[6] Neither the Circuit Court nor the District Court identified any specific foreign policy concerns raised by the instant action.

[7] Under the restrictive, as opposed to the "absolute," theory of immunity, a foreign state is immune from the jurisdiction of U.S. courts for actions arising out of its sovereign acts, but not for lawsuits based upon acts that are private or commercial in nature. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983).

The Fifth Circuit's ruling that second-tier subsidiaries and corporations that are not owned by the foreign state during the pendency of the lawsuit are immune from jurisdiction expands exponentially the number of entities that can qualify for sovereign immunity. As discussed above, the extension of immunity to remote or former corporate sibsidiaries is not required by international law. Foreign courts applying the "separate entity rule," would not grant immunity under similar circumstances.

The extension of immunity to remote and/or former corporate subsidiaries of a foreign state also is contrary to the express language of the FSIA. The FSIA accords immunity only to "foreign states", including "political subdivisions" and "agencies or instrumentalities" of a foreign sate; the express language of the Statute does not extend immunity to entities, like Nuovo Pignone, that are owned by a first-tier agency or instrumentality of a foreign state. Pet.App. G1-G2. Similarly, by referring to foreign states and by defining "agency or instrumentality of a foreign state" only in the present tense, the express language of the FSIA also indicates that a corporation is entitled to immunity only if it is an agency or instrumentality of a foreign state (or political subdivision thereof) during the pendency of the lawsuit. *Id.*

The expansion of the number and nature of entities entitled to claim sovereign immunity comes at the expense of injured American citizens, like the Petitioner. The FSIA provides the sole and exclusive basis for obtaining jurisdiction over a foreign state in this country. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989); Res.Sup.App. 11a-14a. Thus, unless the American citizen has the resources to commence litigation in a foreign country, a ruling that a foreign corporation is entitled to sovereign immunity in the United States will effectively deny relief. As a result of the continued globalization of the economy, a growing number of Americans will face this dilemma and will be denied resource for

injuries suffered in connection with their interactions with remote and/or former corporate subsidiaries of a foreign state. *See* Res.Sup.App. 2a. Accordingly, the Fifth Circuit's ruling upsets the balance struck by Congress in enacting the FSIA.

As noted above, the split in the Circuits as to these issues is deep-rooted. The application of divergent rules could potentially impede U.S. relations with other countries, as varying degrees of deference are accorded to the activities engaged in by foreign entities. Moreover, the movement towards a global economy confirms that, in the future, the lower courts will continue to be confronted with these issues. This case presents this Court with the opportunity to clarify the law and to restore a "uniformity in decision" to the application of foreign sovereign immunity. *See* Res.Sup.App. 13a.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

SUPPLEMENTAL APPENDIX

FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

House Report (Judiciary Committee) No. 94-1487,
Sept. 9, 1976 [To accompany H.R. 11315]

Senate Report (Judiciary Committee) No. 94-1310,
Sept. 27, 1976 [To accompany S. 3553]

Cong. Record Vol. 122 (1976)

DATES OF CONSIDERATION AND PASSAGE

House September 29, 1976
Senate October 1, 1976

The House bill was passed in lieu of the Senate bill.

The House Report is set out.

HOUSE REPORT NO. 94-1487

The Committee on the Judiciary, to whom was referred the bill (H.R. 11315) to define the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

* * * *

PURPOSE

The purpose of the proposed legislation, as amended, is to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity.

STATEMENT

The bill H.R. 11315 was introduced in accordance with the recommendations of an executive communication

transmitted to the Congress by the Departments of State and Justice, and both Departments recommend its enactment with the amendments recommended in this report. The bill was the subject of hearings on June 2, 1976 and June 4, 1976 before this Committee's Subcommittee on Administrative Law and Governmental Relations. The amendments recommended to the bill are the result of matters discussed at those hearings and further developed in consultation with representatives of the Departments of State and Justice.

At the hearings on the bill it was pointed out that American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes. Instances of such contact occur when U.S. businessmen sell goods to a foreign state trading company, and disputes may arise concerning the purchase price. Another is when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions in the contract of sale may become a subject of contention. Still another example occurs when a citizen crossing the street may be struck by an automobile owned by a foreign embassy.

At present, there are no comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state. Unlike other legal systems, U.S. law does not afford plaintiffs and their counsel with a means to commence a suit that is specifically addressed to foreign state defendants. It does not provide firm standards as to when a foreign state may validly assert the defense of sovereign immunity; and, in the event a plaintiff should obtain a final judgment against a foreign state or one of its trading companies, our law does not provide the plain-

tiff with any means to obtain satisfaction of that judgment through execution against ordinary commercial assets.

In a modern world where foreign state enterprises are every day participants in commercial activities, H.R. 11315 is urgently needed legislation. The bill, which has been drafted over many years and which has involved extensive consultations within the administration, among bar associations and in the academic community, would accomplish four objectives:

First, the bill would codify the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis). This principle was adopted by the Department of State in 1952 and has been followed by the courts and by the executive branch ever since. Moreover, it is regularly applied against the United States in suits against the U.S. Government in foreign courts.

Second, the bill would insure that this restrictive principle of immunity is applied in litigation before U.S. courts. At present, this is not always the case. Today, when a foreign state wishes to assert immunity, it will often request the Department of State to make a formal suggestion of immunity to the court. Although the State Department espouses the restrictive principle of immunity, the foreign state may attempt to bring diplomatic influences to bear upon the State Department's determination. A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure

due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity. As was brought out in the hearings on the bill, U.S. immunity practice would conform to the practice in virtually every other country —where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency.

Third, this bill would for the first time in U.S. law, provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state. This would render unnecessary the practice of seizing and attaching the property of a foreign government for the purpose of obtaining jurisdiction.

Fourth, the bill would remedy, in part, the present predicament of a plaintiff who has obtained a judgment against a foreign state. Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment. H.R. 11315 seeks to restrict this broad immunity from execution. It would confirm the execution immunity rules more closely to the jurisdiction immunity rules. It would provide the judgment creditor some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment.

Background

Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state. It differs from diplomatic immunity (which is drawn into issue when an individual diplomat is sued). H.R. 11315 deals solely with sovereign immunity.

Sovereign immunity as a doctrine of international law was first recognized in our courts in the landmark case of *The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116 (1812). There, Chief Justice Marshall upheld a plea of immunity, supported by an executive branch suggestion, by noting that a recognition of immunity was supported by the law and practice of nations. In the early part of this century, the Supreme Court began to place less emphasis on whether immunity was supported by the law and practice of nations, and relied instead on the practices and policies of the State Department. This trend reached its culmination in *Ex Parte Peru*, 318 U.S. 578 (1943)[1] and *Mexico* v. *Hoffman*, 324 U.S. 30 (1945).[2]

Partly in response to these decisions and partly in response to developments in international law, the Department of State adopted the restrictive principle of sovereign immunity in its "Tate Letter" of 1952, 26 Department of State Bulletin 984. Thus, under the Tate letter, the Department undertook, in future sovereign immunity determinations, to recognize immunity in cases based on a foreign state's public acts, but not in cases based on commercial or private acts. The Tate letter, however, has posed a number of difficulties. From a legal standpoint, if the Department applies the restrictive principle in a given case, it is in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts. Moreover, it does not have the machinery to take evidence, to hear witnesses, or to afford appellate review.

From a foreign relations standpoint, the initiative is left to the foreign state. The foreign state chooses which sovereign immunity determinations it will leave to the courts, and which it will take to the State Department. The foreign state also decides when it will attempt to

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[1] 63 S.Ct. 793, 87 L.Ed. 1014.

[2] 65 S.Ct. 530, 89 L.Ed. 729.

exert diplomatic influences, thereby making it more difficult for the State Department to apply the Tate letter criteria.

From the standpoint of the private litigant, considerable uncertainty results. A private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign state will not be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State.

The United States in Foreign Courts

Since World War II, the United States has increasingly become involved in litigation in foreign courts. This litigation has involved such diverse activities as the purchase of goods and services by our embassies, employment of local personnel by our military bases, the construction or lease of buildings for our foreign missions, and traffic accidents involving U.S. Government-owned vehicles.

In the mid-1950's, when the United States first became involved in foreign suits on a large scale, foreign counsel retained by the Department of Justice were instructed to plead sovereign immunity in almost every instance. However, the executive branch learned that almost every country in Western Europe followed the restrictive principle of sovereign immunity and the Government's pleas of immunity were routinely denied in tort and contract cases where the necessary contacts with the forum were present. Thus, in the 1960's, it became the practice of the Department of Justice to avoid claiming immunity when the United States was sued in countries that had adopted the restrictive principle of immunity, but to invoke immunity in those remaining countries that still held to the absolute immunity doctrine. Beginning in the early 1970's, it became the consistent practice of the Department of Justice not to plead sovereign immunity abroad in in-

stances where, under the Tate letter standards, the Department would not recognize a foreign state's immunity in this country.

In virtually every country, the United States has found that sovereign immunity is a question of international law to be determined by the courts. The United States cannot take recourse to a foreign affairs agency abroad as other states have done in this country when they seek a suggestion of immunity from the Department of State.

History of the Bill

H.R. 11315 is the product of many years of work by the Departments of State and Justice, in consultation with members of the bar and the academic community. Study of possible legislation began in the mid-1960's. In the early 1970's, a number of draft bills were prepared and submitted for comment to many authorities and practitioners in the international law field. On January 31, 1973, a bill (H.R. 3493) was introduced in the 93d Congress, and referred to the Committee on the Judiciary. The bill H.R. 3493 was the subject of a subcommittee hearing on June 7, 1973. Although extensive advice had already been obtained from the private sector, in the course of the subcommittee's consideration it became apparent that a few segments of the private bar had not been fully consulted. It was pointed out that the 93d Congress bill contained some technical deficiencies which could be remedied—particularly with respect to maritime cases and the jurisdictional provisions. The American Bar Association at the August 1976 meeting of its House of Delegates adopted a resolution urging approval of H.R. 11315. The letter of that association indicating its support is set out at the end of this report.

The current bill, H.R. 11315, contains revised language. It is essentially the same bill as was introduced in 1973, except for the technical improvements that have been made in the interim.

COMMITTEE AMENDMENTS

The committee, after careful consideration of the bill, made the following amendments:

1. In sections 1604 and 1609 of the bill, the committee has preserved the reference to "existing international agreements" but has deleted the language that would make this bill subject to "future" agreements. Mention of future agreements was found to be unnecessary and misleading. The purpose for including the reference was to take into account the possibility that sovereign immunity might become the subject of an international convention. Such a convention would, under article VI of the Constitution, take precedence, whether or not the bill was made expressly subject to a future international agreement. Moreover, it was thought best to eliminate any possible question that this language might be construed to authorize a future international agreement. However, the reference to existing international agreements is essential to make it clear that this bill would not supersede the special procedures provided in existing international agreements, such as the North Atlantic Treaty—Status of Forces Agreement.

2. Section 1606, relating to public debt obligations, has been deleted and the former section 1605(c) has been deleted and the former section 1605(c) has been renumbered as section 1606. The public debt provision was, at best, very limited. It applied only to debt obligations incurred "for general governmental purposes." It did not apply to debts incurred either for specific government projects (such as the building of a dam) or to further a commercial activity. In practice, the provision would have had virtually no effect because U.S. underwriters of foreign government bonds and U.S. banks lending to foreign governments would invariably include an express waiver of immunity in the debt instrument. Moreover, both a sale of bonds to the public and a direct loan

from a U.S. commercial bank to a foreign government are activities which are of a commercial nature and should be treated like other similar commercial transactions. Such commercial activities would not otherwise give rise to immunity and would be subject to U.S. regulation, such as that provided by the securities laws. Thus, on reconsideration of all of the factors, the committee has concluded that a public debt provision would serve no significant purpose and would be inappropriate.

3. Former section 1605(c), renumbered as section 1606, has also been revised in two other respects. First, it makes clear that the exception for punitive damages applies to political subdivisions of foreign states, as well as to the foreign state itself. This accords with current international practice. Second, it would eliminate the exception for interest prior to judgment. Such an exception is not supported by international practice. If a foreign state is not immune from suit, it should be liable for interest to the same extent as a private party.

4. Section 1608 has been substantially revised, with the principal revisions being in subsection (a). A number of bar association studies which otherwise expressed full support for the bill, pointed out that subsection (a), as previously drafted, created a significant gap in its provisions concerning service upon a foreign state through diplomatic channels. The Departments of Justice and State have reconsidered this provision and have indicated their preference for the revised language in the committee amendment. The committee has revised subsection (a) to fill the prior gap, and, at the same time, to minimize potential irritants to relations with foreign states. Subsection (a), as revised, would provide that service of a summons and complaint also be accompanied by a new document, called a notice of suit. The notice of suit is designed to provide a foreign state with an introductory explanation of the lawsuit, together with an explanation

of the legal significance of the summons, complaint, and service.

The revised paragraphs (a)(2) and (b)(2) of section 1608 give emphasis to service under an "applicable international convention on service of judicial documents." At present, there is such an applicable international convention—the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, TIAS 6638, 20 UST 361—to which the Senate gave its advice and consent to ratification, and which entered into force for the United States in 1969. At present 18 nations are parties to this convention. In the committee's view, if a country has entered into such an international convention, priority should be given to this method for service.

Subsection (d) has been revised to delete the references to cross-claims and counterclaims. The existence of a counterclaim against a foreign state indicates that the foreign state has already entered an appearance in the lawsuit; thus, there is no necessity for affording the foreign state with a special time period in which to respond to a counterclaim. When a cross-claim is filed against a foreign state, rules 19 and 20, of the Federal Rules of Civil Procedure, require that original service be made. Under rules the bill, this would mean service under section 1608 (a) or (b).

5. Finally, your committee has made a few perfecting amendments in the bill's provisions involving maritime jurisdiction. These include changes in section 1605(b) to make it clear that the delivery of notice to a master of a vessel under paragraph (1) does not itself constitute "service"; and to make clear, in cases where the plaintiff is unaware that he has arrested a foreign state-owned vessel, that the 10-day period in paragraph (2) does not begin to run until the plaintiff has determined that a foreign state owns the vessel. Section 1609 has been amended to make it clear that it applies to arrests of a vessel, as well as to attachment and execution.

Conclusion

On the basis of the facts outlined in the executive communication and the testimony at the hearings on the bill, the committee finds that there is a clearly defined need for the enactment of these provisions into law. It is recommended that the amended bill be approved.

Section-by-Section Analysis

This bill, entitled the "Foreign Sovereign Immunities Act of 1976," sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. It is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities. It is also designed to bring U.S. practice into conformity with that of most other nations by leaving sovereign immunity decisions exclusively to the courts, thereby discontinuing the practice of judicial deference to "suggestions of immunity" from the executive branch. (See *Ex Parte Peru*, 318 U.S. 578, 588-589 (1943)[3].)

The bill is not intended to affect the substantive law of liability. Nor is it intended to affect either diplomatic or consular immunity, or the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong.

Aside from setting forth comprehensive rules governing sovereign immunity, the bill prescribes: the jurisdiction of U.S. district courts in cases involving foreign states, procedures for commencing a lawsuit against foreign states in both Federal and State courts, and circumstances under which attachment and execution may be obtained

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[3] 63 S. Ct. 793, 87 L.Ed. 1014.

against the property of foreign states to satisfy a judgment against foreign states in both Federal and State courts.

Constitutional authority for enacting such legislation derives from the constitutional power of the Congress to prescribe the jurisdiction of Federal courts (art. I, sec. 8, cl. 9; art. III, sec. 1); to define offenses against the "Law of Nations" (art. I, sec. 8, cl. 10); to regulate commerce with foreign nations (art. I, sec. 8, cl. 3); and "to make all Laws which shall be necessary and proper for carrying into Execution * * * all * * * Powers vested * * * in the Government of the United States," including the judicial power of the United States over controversies between "a State, or the Citizens thereof, and foreign States * * *." (art. I, sec. 8, cl. 18; art. III, sec. 2, cl. 1). See *National Bank* v. *Republic of China*, 348 U.S. 356, 370-71 (1955)[4] (Reed J., dissenting); *cf. Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964).[5]

The committee wishes to emphasize that this section-by-section analysis supersedes the section-by-section analysis that accompanied the earlier version of the bill in the 93rd Congress (that is, S. 566 and H.R. 3493, 93d Cong., 1st sess.); the prior analysis should not be consulted in interpreting the current bill and its provisions, and no inferences should be drawn from differences between the two.

SEC. 2. JURISDICTION IN ACTIONS AGAINST FOREIGN STATES

Section 2 of the bill adds a new section 1330 to title 28 of the United States Code, and provides for subject matter and personal jurisdiction of U.S. district courts over foreign states and their political subdivisions, agen-

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[4] 75 S.Ct. 423, 99 L.Ed. 389, rehearing denied 75 S.Ct. 598, 349 U.S. 913, 99 L.Ed. 1247.

[5] 84 S.Ct. 923, 11 L.Ed.2d 804.

cies, and instrumentalities. Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states. Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences. Plaintiffs, however, will have an election whether to proceed in Federal court or in a court of a State, subject to the removal provisions of section 6 of the bill.

(a) *Subject Matter Jurisdiction.*—Section 1330(a) gives Federal district courts original jurisdiction in personam against foreign states (defined as including political subdivisions, agencies, and instrumentalities of foreign states). The jurisdiction extends to any claim with respect to which the foreign state is not entitled to immunity under sections 1605-1607 proposed in the bill, or under any applicable international agreement of the type contemplated by the proposed section 1604.

As in suits against the U.S. Government, jury trials are excluded. See 28 U.S.C. 2402. Actions tried by a court without jury will tend to promote a uniformity in decision where foreign governments are involved.

In addition, the jurisdiction of district courts in cases against foreign states is to be without regard to amount in controversy. This is intended to encourage the bringing of actions against foreign states in Federal courts. Under existing law, the district courts have diversity jurisdiction in actions in which foreign states are parties, but only where the amount in controversy exceeds $10,000. 28 U.S.C. 1332(a)(2) and (3). (See analysis of sec. 3 of the bill, below.)

A judgment dismissing an action for lack of jurisdiction because the foreign state is entitled to sovereign immunity would be determinative of the question of sovereign immunity. Thus, a private party, who lost on the question

of jurisdiction, could not bring the same case in a State court claiming that the Federal court's decision extended only to the question of Federal jurisdiction and not to sovereign immunity.

(b) *Personal Jurisdiction.*—Section 1330(b) provides, in effect, a Federal long-arm statute over foreign states (including political subdivisions, agencies, and instrumentalities of foreign states). It is patterned after the long-arm statute Congress enacted for the District of Columbia. Public Law 91-358, sec. 132(a), title I, 84 Stat. 549. The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. Cf. *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945),[6] and *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957).[7] For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction. Besides incorporating these jurisdictional contacts by reference, section 1330(b) also satisfies the due process requirement of adequate notice by prescribing that proper service be made under section 1608 of the bill. Thus, sections 1330(b), 1608, and 1605-1607 are all carefully interconnected.

(c) *Effect of an Appearance.*—Section 1330(c) states that a mere appearance by a foreign state in an action does not confer personal jurisdiction with respect to claims

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[6] 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057.

[7] 78 S.Ct. 199, 2 L.Ed.2d 223.

which could not be brought as an independent action under this bill. The purpose is to make it clear that a foreign state does not subject itself to claims unrelated to the action solely by virtue of an appearance before a U.S. court. While the plaintiff is free to amend his complaint, he is not permitted to add claims for relief not based on transactions or occurrences listed in the bill. The term "transaction or occurrence" includes each basis set forth in sections 1605-1607 for not granting immunity, including waivers.

SEC. 3. DIVERSITY JURISDICTION AS TO FOREIGN STATES

Section 3 of the bill amends those provisions of 28 U.S.C. 1332 which relate to diversity jurisdiction of U.S. district courts over foreign states. Since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous. The amendment deletes references to "foreign states" now found in paragraphs (2) and (3) of 28 U.S.C. 1332(a), and adds a new paragraph (4) to provide for diversity jurisdiction in actions brought by a foreign state as plaintiff. These changes would not affect the applicability of section 1332 to entities that are both owned by a foreign state and are also citizens of a state of the United States as defined in 28 U.S.C. 1332 (c) and (d). See analysis to section 1603(b).

SEC. 4. NEW CHAPTER 97:
SOVEREIGN IMMUNITY PROVISIONS

Section 4 of the bill adds a new chapter 97 to title 28, United States Code, which sets forth the legal standards under which Federal and State courts would henceforth determine all claims of sovereign immunity raised by foreign states and their political subdivisions, agencies, and instrumentalities. The specific sections of chapter 97 are as follows:

Section 1602. Findings and declaration of purpose

Section 1602 sets forth the central premise of the bill: That decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law.

Although the general concept of sovereign immunity appears to be recognized in international law, its specific content and application have generally been left to the courts of individual nations. There is, however, a wide acceptance of the so-called restrictive theory of sovereign immunity; that is, that the sovereign immunity of foreign states should be "restricted" to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform. This restrictive theory has been adhered to by the Department of State since the "Tate Letter" of May 19, 1952. (26 Dept. of State Bull. 984 (1952).)

Section 1603. Definitions

Section 1603 defines five terms that are used in the bill:

(a) *Foreign state.*—Subsection (a) defines the term foreign state as used in all provisions of chapter 97, except section 1608. In section 1608, the term "foreign state" refers only to the sovereign state itself.

As the definition indicates, the term "foreign state" as used in every other section of chapter 97 includes not only the foreign state but also political subdivisions, agencies and instrumentalities of the foreign state. The term "political subdivisions" includes all governmental units beneath the central government, including local governments.

(b) *Agency or instrumentality of a foreign state.*—Subection (b) defines an "agency or instrumentality of a

foreign state" as any entity (1) which is a separate legal person, (2) which is an organ of a foreign state or of a political subdivision of a foreign state, or a majority of whose shares or other ownership interest is owned by a foreign state or by a foreign state's political subdivision, and (3) which is neither a citizen of a State of the United States as defined in 28 U.S.C. 1332(c) and (d) nor created under the laws of any third country.

The first criterion, that the entity be a separate legal person, is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name.

The second criterion requires that the entity be either an organ of a foreign state (or of a foreign state's political subdivision), or that a majority of the entity's shares or other ownership interest be owned by a foreign state (or by a foreign state's political subdivision). If such entities are entirely owned by a foreign state, they would of course be included within the definition. Where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision.

The third criterion excludes entities which are citizens of a State of the United States as defined in 28 U.S.C. 1332 (c) and (d)—for example a corporation organized and incorporated under the laws of the State of New York but owned by a foreign state. (See *Amtorg Trading Corp.* v. *United States*, 71 F.2d 524 (C.C.P.A. 1934).) Also excluded are entities which are created under the laws of third countries. The rationale behind these exclusions is that if a foreign state acquires or establishes a company or other legal entity in a foreign country, such

entity is presumptively engaging in activities that are either commercial or private in nature.

An entity which does not fall within the definitions of sections 1603 (a) or (b) would not be entitled to sovereign immunity in any case before a Federal or State court. On the other hand, the fact that an entity is an "agency or instrumentality of a foreign state" does not in itself establish an entitlement to sovereign immunity. A court would have to consider whether one of the sovereign immunity exceptions contained in the bill (see sections 1605-1607 and 1610-1611) was applicable.

As a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

(c) *United States.*—Paragraph (c) of section 1603 defines "United States" as including all territory and waters subject to the jurisdiction of the United States.

(d) *Commercial activity.*—Paragraph (c) of section 1603 defines the term "commercial activity" as including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A "regular course of commercial conduct" includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a "particular transaction or act."

As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.

By contrast, a foreign state's mere participation in a foreign assistance program administered by the Agency for International Development (AID) is an activity whose essential nature is public or governmental, and it would not itself constitute a commercial activity. By the same token, a foreign state's activities in and "contacts" with the United States resulting from or necessitated by participation in such a program would not in themselves constitute a sufficient commercial nexus with the United States so as to give rise to jurisdiction (see sec. 1330) or to assets which could be subjected to attachment or execution with respect to unrelated commercial transactions (see sec. 1610(b)). However, a transaction to obtain goods or services from private parties would not lose its otherwise commercial character because it was entered into in connection with an AID program. Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States.

The courts would have a great deal of latitude in determining what is a "commercial activity" for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable. Activities such as a foreign government's sale of

a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition.

(e) *Commercial activity carried on in the United States by a foreign state.*—As paragraph (d) of section 1603 indicates, a commercial activity carried on in the United States by a foreign state would include not only a commercial transaction performed and executed in its entirety in the United States, but also a commercial transaction or act having a "substantial contact" with the United States. This definition includes cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States (cf. § 1605 (a)(5)), and an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States —for example, loans, guarantees or insurance provided by the Export-Import Bank of the United States. It will be for the courts to determine whether a particular commercial activity has been performed in whole or in part in the United States. This definition, however, is intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff.

Section 1604. Immunity of foreign states from jurisdiction

New chapter 97 of title 28, United States Code, starts from a premise of immunity and then creates exceptions to the general principle. The chapter is thus cast in a manner consistent with the way in which the law of sovereign immunity has developed. Stating the basic principle in terms of immunity may be of some advantage to

foreign states in doubtful cases, but, since sovereign immunity is an affirmative defense which must be specially pleaded, the burden will remain on the foreign state to produce evidence in support of its claim of immunity. Thus, evidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff's claim relates to a public act of the foreign state—that is, an act not within the exceptions in sections 1605-1607. Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.

The immunity from jurisdiction provided in section 1604 applies to proceedings in both Federal and State courts. Section 1604 would be the only basis under which a foreign state could claim immunity from the jurisdiction of any Federal or State court in the United States.

All immunity provisions in sections 1604 through 1607 are made subject to "existing" treaties and other international agreements to which the United States is a party. In the event an international agreement expressly conflicts with this bill, the international agreement would control. Thus, the bill would not alter the rights or duties of the United States under the NATO Status of Forces Agreement or similar agreements with other countries; nor would it alter the provisions of commercial contracts or agreements to which the United States is a party, calling for exclusive nonjudicial remedies through arbitration or other procedures for the settlement of disputes.

Treaties of friendship, commerce and navigation and bilateral air transport agreements often contain provisions relating to the immunity of foreign states. Many provisions in such agreements are consistent with, but do not go as far as, the current bill. To the extent such international

agreements are silent on a question of immunity, the bill would control; the international agreement would control only where a conflict was manifest.

Section 1605. General exceptions to the jurisdictional immunity of foreign states

Section 1605 sets forth the general circumstances in which a claim of sovereign immunity by a foreign state, as defined in section 1603(a), would not be recognized in a Federal or State court in the United States.

(a)(1) *Waivers.*—Section 1605(a)(1) treats explicit and implied waivers by foreign states of sovereign immunity. With respect to explicit waivers, a foreign state may renounce its immunity by treaty, as has been done by the United States with respect to commercial and other activities in a series of treaties of friendship, commerce, and navigation, or a foreign state may waive its immunity in a contract with a private party. Since the sovereign immunity of a political subdivision, agency or instrumentality of a foreign state derives from the foreign state itself, the foreign state may waive the immunity of its political subdivisions, agencies or instrumentalities.

With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.

The language, "notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver," is designed to exclude a withdrawal of the waiver both after and before a dispute arises except in accordance with the terms of the original waiver. In other words, if the for-

eign state agrees to a waiver of sovereign immunity in a contract, that waiver may subsequently be withdrawn only in a manner consistent with the expression of the waiver in the contract. Some court decisions have allowed subsequent and unilateral rescissions of waivers by foreign states. But the better view, and the one followed in this section, is that a foreign state which has induced a private person into a contract by promising not to invoke its immunity cannot, when a dispute arises, go back on its promise and seek to revoke the waiver unilaterally.

(a)(2) *Commercial activities having a nexus with the United States.*—Section 1605(a)(2) treats what is probably the most important instance in which foreign states are denied immunity, that in which the foreign state engages in a commercial activity. The definition of a "commercial activity" is set forth in section 1603(d) of the bill, and is discussed in the analysis to that section.

Section 1605(a)(2) mentions three situations in which a foreign state would not be entitled to immunity with respect to a claim based upon a commercial activity. The first of these situations is where the "commercial activity [is] carried on in the United States by the foreign state." This phrase is defined in section 1603(e) of the bill. See the analysis to that section.

The second situation, an "act performed in the United States in connection with a commercial activity of the foreign state elsewhere," looks to conduct of the foreign state in the United States which relates either to a regular course of commercial conduct elsewhere or to a particular commercial transaction concluded or carried out in part elsewhere. Examples of this type of situation might include: a representation in the United States by an agent of a foreign state that leads to an action for restitution based on unjust enrichment; an act in the United States that violates U.S. securities laws or regulations; the wrongful discharge in the United States of an employee of the

foreign state who has been employed in connection with a commercial activity carried on in some third country.

Although some or all of these acts might also be considered to be a "commercial activity carried on in the United States," as broadly defined in section 1603(e), it has seemed advisable to provide expressly for the case where a claim arises out of a specific act in the United States which is commercial or private in nature and which relates to a commercial activity abroad. It should be noted that the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action.

The third situation—"an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States"—would embrace commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965).

Neither the term "direct effect" nor the concept of "substantial contacts" embodied in section 1603(e) is intended to alter the application of the Sherman Antitrust Act, 15 U.S.C. 1, *et seq.*, to any defendant. Thus, the bill does not affect the holdings in such cases as *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U.S. 87 (1913),[8] or *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 803 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969).[9]

(a)(3) *Expropriation claims.*—Section 1605(a)(3) would, in two categories of cases, deny immunity where

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[8] 33 S.Ct. 443, 57 L.Ed. 742.

[9] 89 S.Ct. 872, 21 L.Ed.2d 784.

"rights in property taken in violation of international law are in issue." The first category involves cases where the property in question or any property exchanged for such property is present in the United States, and where such presence is in connection with a commercial activity carried on in the United States by the foreign state, or political subdivision, agency or instrumentality of the foreign state. The second category is where the property, or any property exchanged for such property, is (i) owned or operated by an agency or instrumentality of a foreign state and (ii) that agency or instrumentality is engaged in a commercial activity in the United States. Under the second category, the property need not be present in connection with a commercial activity of the agency or instrumentality.

The term "taken in violation of international law" would include the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature. Since, however, this section deals solely with issues of immunity, it in no way affects existing law on the extent to which, if at all, the "act of state" doctrine may be applicable. See 22 U.S.C. 2370(e)(2).[1]

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[1] The committee has been advised that in some cases, after the defense of sovereign immunity has been denied or removed as an issue, the art of state doctrine may be improperly asserted in an effort to block litigation. Under the act of state doctrine, United States Courts may refuse to adjudicate the validity of purely public acts of foreign sovereigns, as distinguished from commercial acts, committed and effective within their own territory. For example, in the Supreme Court's recent decision in *Dunhill* v. *Republic of Cuba*, 44 U.S.L.W. 4665. No. 73-1288 (May 24, 1976, the respondent having brought suit (and thus clearly having waived the defense of sovereign immunity) attempted to assert that a refusal to pay a commercial obligation was not reviewable because it was an "act of state".

The committee has found it unnecessary to address the act of state doctrine in this legislation since decisions such as that in the

(a)(4) *Immovable, inherited, and gift property.*—Section 1605(a)(4) denies immunity in litigation relating to rights in real estate and in inherited or gift property located in the United States. It is established that, as set forth in the "Tate Letter" of 1952, sovereign immunity should not be granted in actions with respect to real property, diplomatic and consular property excepted. 26 Department of State Bulletin 984 (1952). It does not matter whether a particular piece of property is used for commercial or public purposes.

It is maintainable that the exception mentioned in the "Tate Letter" with respect to diplomatic and consular property is limited to questions of attachment and execution and does not apply to an adjudication of rights in that property. Thus the Vienna Convention on Diplomatic Relations, concluded in 1961, 23 UST 3227, TIAS 7502 (1972), provides in article 22 that the "premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution." Actions short of attachment or execution seem to be permitted under the Convention, and a foreign state cannot deny to the local state the right to adjudicate questions of owner-

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Dunhill case demonstrate that our courts already have considerable guidance enabling them to reject improper assertions of the act of state doctrine. For example, it appears that the doctrine would not apply to the cases covered by H.R. 11315, whose touchstone is a concept of "commercial activity" involving significant jurisdictional contacts with this country. The conclusions of the committe are in concurrence with the position of the government in its *amicus* brief to the Supreme Court in the *Dunhill* case where the Solicitor General stated:

"[U]nder the modern restrictive theory of soverign immunity, a foreign state is not immune from suit on its commercial obligations. To elevate the foreign state's commercial acts to the protected status of 'acts of state' would frustrate this modern development by permitting sovereign immunity to reenter through the back door, under the guise of the act of state doctrine." (Amicus Brief of United States, p. 41.)

ship, rent, servitudes, and similar matters, as long as the foreign state's possession of the premises is not disturbed.

There is general agreement that a foreign state may not claim immunity when the suit against it relates to rights in property, real or personal, obtained by gift or inherited by the foreign state and situated or administered in the country where the suit is brought. As stated in the "Tate Letter," immunity should not be granted "with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary." The reason is that, in claiming rights in a decedent's estate or obtained by gift, the foreign state claims the same right which is enjoyed by private persons.

(a)(5) *Noncommercial torts.*—Section 1605(a)(5) is directed primarily at the problem of traffic accidents but is cast in general terms as applying to all tort actions for money damages, not otherwise encompassed by section 1605(a)(2) relating to commercial activities. It denies immunity as to claims for personal injury or death, or for damage to or loss of property, caused by the tortious act or omission of a foreign state or its officials or employees, acting within the scope of their authority; the tortious act or omission must occur within the jurisdiction of the United States, and must not come within one of the exceptions enumerated in the second paragraph of the subsection.

As used in section 1605(a)(5), the phrase "tortious act or omission" is meant to include causes of action which are based on strict liability as well as on negligence. The exceptions provided in subparagraphs (A) and (B) of section 1605(a)(5) correspond to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act, 28 U.S.C. 2680 (a) and (h).

Like other provisions in the bill, section 1605 is subject to existing international agreements (see section 1604), including Status of Forces Agreements; if a remedy is

available under a Status of Forces Agreement, the foreign state is immune from such tort claims as are encompassed in sections 1605(a)(2) and 1605(a)(5).

Since the bill deals only with the immunity of foreign states and not its diplomatic or consular representatives, section 1605(a)(5) would not govern suits against diplomatic or consular representatives but only suits against the foreign state. It is noteworthy in this regard that while article 43 of the Vienna Convention on Consular Relations of 1963, 21 UST 77, TIAS 6820 (1970), expressly abolishes the immunity of consular officers with repect to civil actions brought by a third party for "damage arising from an accident in the receiving state caused by a vehicle, vessel or aircraft," there is no such provision in the Vienna Convention on Diplomatic Relations of 1961, *supra*. Consequently, no case relating to a traffic accident can be brought against a member of a diplomatic mission.

The purpose of section 1605(a)(5) is to permit the victim of a traffic accident or other noncommercial tort to maintain an action against the foreign state to the extent otherwise provided by law. See, however, section 1605(c).

(b) *Maritime liens.*—Section 1605(b) denies immunity to a foreign state in cases where (i) a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of that foreign state, (ii) the maritime lien is based upon a commercial activity of the foreign state, and (iii) the conditions in paragraphs (1) and (2) of section 1605(b) have been complied with.

The purpose of this subsection is to permit a plaintiff to bring suit in a U.S. district court arising out of a maritime lien involving a vessel or cargo of a foreign sovereign without arresting the vessel, by instituting an in personam against the foreign state in a manner analogous to bringing such a suit against the United States. Cf. 46 U.S.C.

741, *et seq.* In view of section 1609 of the bill, section 1605(b) is designed to avoid arrests of vessels or cargo of a foreign state to commence a suit. Instead, as provided in paragraph (1), a copy of the summons and complaint must be delivered to the master or other person having possession of the vessel or cargo (such as the second in command of the ship).

If, however, the vessel or its cargo is arrested or attached the plaintiff will lose his in personam remedy and the foreign state will be entitled to immunity—except in the case where the plaintiff was unaware that the vessel or cargo of a foreign state was involved. This would be a rare case because the flag of the vessel, the circumstances giving rise to the maritime lien, or the information contained in ship registries kept in ports throughout the United States should make known the ownership of the vessel in question, if not the cargo. By contrast, evidence that a party had relied on a standard registry of ships, which did not reveal a foreign state's interest in a vessel, would be prima facie evidence of the party's unawareness that a vessel of a foreign state was involved. More generally, a party could seek to establish its lack of awareness of the foreign state's ownership by submitting affidavits from itself and from its cousel. If, however, the vessel or cargo is mistakenly arrested, such arrest or attachment must, under section 1609, be immediately dissolved when the foreign state brings to the court's attention its interest in the vessel or cargo and, hence, its right to immunity from arrest.

Under paragraph (2), the plaintiff must also be able to prove that the procedures for service under section 1608(a) or (b) have commenced—for example, that the clerk of the court has mailed the requisite copies of the summons and complaint. The plaintiff need not show that service has actually been made under section 1608 (c). The reason for this second requirement is to help make certain that the foreign state concerned receives

prompt and actual notice of the institution of a suit in admiralty in the United States, even if the copies served on the master of the vessel should fail to reach the foreign state.

Section 1605(b) would not preclude a suit in accordacne with other provisions of the bill—e.g., section 1605 (a)(2). Nor would it preclude a second action, otherwise permissible, to recover the amount by which the value of the maritime lien exceeds the recovery in the first action.

Section 1606. Extent of liability

Section 1606 makes clear that if the foreign state, political subdivision, agency or instrumentality is not entitled to immunity from jurisdiction, liability exists as it would for a private party under like circumstances. However, the tort liability of a foreign state itself, and of its political subdivision (but not of an agency or instrumentality of a foreign state) does not extend to punitive damages. Under current international practice, punitive damages are usually not assessed against foreign states. See 5 Hackwork, Digest of International Law, 723-26 (1943); Garcia-Amador, State Responsibility, 94 Hague Recueil des Cours 365, 476-81 (1958). Interest prior to judgment and costs may be assessed against a foreign state just as against a private party. Cf. 46 U.S.C. 743, 745.

Consistent with this section, a court could, when circumstances were clearly appropriate, order an injunction or specific performance. But this is not determinative of the power of the court to enforce such an order. For example, a foreign diplomat or official could not be imprisoned for contempt because of his government's violation of an injunction. See 22 U.S.C. 252. Also a fine for violation of an injunction may be unenforceable if immunity exists under sections 1609-1610.

The bill does not attempt to deal with questions of discovery. Existing law appears to be adequate in this

area. For example, if a private plaintiff sought the production of sensitive governmental documents of a foreign state, concepts of governmental privilege would apply.[2] Or if a plaintiff sought to depose a diplomat in the United States or a high-ranking official of a foreign government, diplomatic and official immunity would apply. However, appropriate remedies would be available under Rule 37, F.R. Civ. P., for an unjustifiable failure to make discovery.

Section 1607. Counterclaims

Section 1607 applies to counterclaims against a foreign state which brings an action or intervenes in an action in a Federal or State court. It would deny immunity in three situations. First, immunity would be denied as to any counterclaim for which the foreign state would not be entitled to immunity under section 1605, if the counterclaim had been brought as a direct claim in a separate action against the foreign state. This provision is based upon article I of the European Convention on State Immunity 11 Int'l Legal Materials 470 (1972).

Second, even if a foreign state would otherwise be entitled to immunity under sections 1604-1606, it would not be immune from a counterclaim "arising out of the transaction of occurrence that is the subject matter of the claim of the foreign state." This is the same terminology as that used in rule 13(a) of the Federal Rules of Civil Procedure and is consistent with section 70(2)(b), Restatement of the Law, Second, Foreign Relations Law of the United States (1965). Certainly, if a foreign state brings or intervenes in an action based on a particular transaction or occurrence, it should not obtain the benefits of litigation before U.S. courts while avoiding any legal liabilities claimed against it and arising from that same transaction or occurrence. See, *Alfred Dunhill of*

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[2] e.g. 5 U.S.C. 552 concerning public information.

London, Inc., v. *Cuba*, —— U.S. ——, No. 73-1288, decided May 24, 1976).[10]

Third, notwithstanding that the foreign state may be immune under sections (a) and (b), the foreign state nevertheless would not be immune from a setoff. Subsection (c) codifies the rule enunciated in *National Bank* v. *Republic of China*, 348 U.S. 356 (1955).[11]

Section 1608. Service; time to answer; default

Section 1608 sets forth the exclusive procedures with respect to service on, the filing of an answer or other responsive pleading by and obtaining a default judgment against a foreign state or its political subdivisions, agencies or instrumentalities. These procedural provisions are intended to fill a void in existing Federal and State law, and to insure that private persons have adequate means for commencing a suit against a foreign state to seek redress in the courts.

Provisions in section 1608 are closely interconnected with other parts of the bill—particularly the proposed section 1330 and sections 1605-1607. If notice is served under section 1608 and if the jurisdictional contacts embodied in sections 1605-1607 are satisfied, personal jurisdiction over a foreign state would exist under section 1330(b). In addition to its integral role in the bill, section 1608 follows on the precedents of other statutory service provisions in areas of unusual Federal interest. See, for example, 8 U.S.C. 1105a(3) and 15 U.S. 21(f) and 77v.

(a) *Service on Foreign States and Political Subdivisions.*—Subsection (a) of section 1608 sets forth the exclusive procedures for service on a foreign state, or political subdivision thereof, but not on an agency or

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10 96 S.Ct. 1854, 48 L.Ed.2d 301.

11 75 S.Ct. 423, 99 L.Ed. 389, rehearing denied 75 S.Ct. 598, 349 U.S. 913, 99 L.Ed. 1247.

instrumentality of a foreign state which is covered in subsection (b). There is a hierarchy in the methods of service. Paragraph (1) provides for service in accordance with any special arrangement which may have been agreed upon between a plaintiff and the foreign state or political subdivision. If such an arrangement exists, service must be made under this method. The purpose of subsection (a)(1) is to encourage potential plaintiffs and foreign states to agree to a procedure on service.

If no special arrangement exists, paragraph (2) would permit service in accordance with an applicable international convention on service of judicial documents. The only such convention to which the United States is at present a party is the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, 20 UST 361, TIAS 6638 (1969). In order for an international convention to be "applicable", both the United States and the foreign state concerned must be a party to the convention.

If neither an applicable international convention nor a special arrangement exists, paragraph (3) would provide for service by mail. The clerk of the court should send a copy of a "notice of suit" as prescribed by the Secretary of State by regulation, together with a copy of the summons and complaint, by mail to the head of the foreign state's ministry of foreign affairs or its equivalent. This procedure is based on rule 4(i)(1)(D), F.R. Civ. P.

Finally, as a method of last resort, paragraph (4) would provide for service through diplomatic channels if service could not be made by mail within 30 days. The clerk of the court would send two copies of the notice of suit, summons and complaint to the Secretary of State for transmittal through diplomatic channels. Transmittal through diplomatic channels would mean that the Office of Special Consular Service in the Department of State will pouch a copy of these papers to the U.S. Embassy in the foreign state in question. The U.S. Embassy, in turn,

would prepare a diplomatic note of transmittal and deliver the diplomatic note with the other papers to the appropriate official in the ministry of foreign affairs of the foreign state. Use of diplomatic channels could also include transmittal of the papers by the Department of State to the foreign state's embassy in Washington, D.C. "Transmittal" of the notice of suit, summons and complaint does not require that the foreign state formally accept these papers. It only requires that these papers be transmitted in such a way that the foreign state has actual notice of the suit. All papers to be served would be accompanied by translations into an official language of the foreign state. Finally, the Secretary of State would be required to send back to the court the diplomatic note used in transmitting the papers to the foreign state.

A "notice of suit" as used in this section would advise a foreign state of the legal proceeding, it would explain the legal significance of the summons, complaint and service, and it would indicate what steps are available under or required by U.S. law in order to defend the action. In short, it would provide an introductory explanation to a foreign state that may be unfamiliar with U.S. law or procedures.

Service through diplomatic channels is widely used in international practice. It is provided for in the European Convention on State Immunity, *supra,* which was negotiated by 18 European nations. It is accepted and indeed preferred by the United States in suits brought against the United States Government in foreign courts. See Department of State's circular instruction No. CA-10922, June 16, 1961, 56 Am. J. Int'l L. 523-33 (1962).

(b) *Service on Agencies or Instrumentalities.*—Subsection (b) of section 1608 provides the methods under which service shall be made upon an agency or instrumentality of a foreign state, as defined in section 1603 (b). Again, service must always be made in accordance with any special arrangement for service between a plain-

tiff and the agency or instrumentality. If no such arrangement exists, then service must be made under subsection (b)(2) which provides for service upon officers, or managing, general or appointed agents in the United States of any agency on instrumentality—or in the alternative, in accordance with an applicable international convention such as the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, *supra.*

If there is no special arrangement and if the agency or instrumentality has no representative in the United States, service may be made under one of the three methods provided in subsection (b)(3). The first two methods provide for service by letter rogatory or request or by mail. The third method, subparagraph (C), authorizes a court to fashion a method of service, for example under Rule 83, F.R. Civ. P., provided the method is "consistent with the law of the place where service is to be made." This latter language takes into account the fact that the laws of foreign countries may prohibit the service in their country of judicial documents by process servers from the United States. It is contemplated that no court will direct service upon a foreign state by appointing someone to make a physical attempt at service abroad, unless it is clearly consistent with the law of the foreign jurisdiction where service is to be attempted. It is also contemplated that the courts will not direct service in the United States upon diplomatic representatives, *Hellenic Lines Ltd.* v. *Moore,* 345 F. 2d 978 (D.C. Cir. 1965), or upon consular representatives, *Oster* v. *Dominion of Canada,* 144 F. Supp. 746 (N.D.N.Y. 1956), *aff'd,* 238 F. 2d 400 (2d Cir. 1956).

(c) *When Service Is Made.*—Subsection (c) of section 1608 establishes the time when service shall be deemed to have been made under each of the methods provided in subsections (a) and (b).

(d) *Time To Answer or Reply.*—Subsection (d) of section 1608 gives each foreign state, political subdivision

thereof or agency or instrumentality of a foreign state or political subdivision up to 60 days from the time service is deemed to have been made in which to answer or file a responsive pleading. This corresponds to similar provisions applicable in suits against the United States or its officers or agencies. Rule 12(a), F.R. Civ. P.

(e) *Default Judgments.*—Subdivision (e) of section 1608 provides that no default judgment may be entered against a foreign state, or its political subdivisions, agencies or instrumentalities, "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." This is the same requirement applicable to default judgments against the U.S. Government under rule 55(e), F.R. Civ. P. In determining whether the claimant has established his claim or right to relief, it is expected that courts will take into account the extent to which the plaintiff's case depends on appropriate discovery against the foreign state.[3] Once the default judgment is entered, notice of such judgment must be sent in the manner prescribed for service in sections 1608 (a) or (b).

Special note should be made of two means which are currently in use in attempting to commence litigation against a foreign state. First, the current practice of attempting to commence a suit by attachment of a foreign state's property would be prohibited under section 1609 in the bill, because of foreign relations considerations and because such attachments are rendered unnecessary by the liberal service and jurisdictional provisions of the bill. See the analysis to section 1609.

A second, means, of questionable validity, involves the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state. Section 1608 precludes this method so as to avoid questions of inconsist-

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[3] Cf. Statement in the analysis of section 1606 noting that appropriate remedies would be available under Rule 37, F.R. Civ. P. for an unjustifiable failure to make discovery.

ency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations, 23 UST 3227, TIAS 7502 (1972), which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill. See 71 Dept. of State Bull. 458-59 (1974).

Section 1609. Immunity from Attachment and Execution of Property of a Foreign State

As in the case of section 1604 of the bill with respect to jurisdiction, section 1609 states a general proposition that the property of a foreign state, as defined in section 1603(a), is immune from attachment and from execution, and then exceptions to this proposition are carved out in sections 1610 and 1611. Here, it should be pointed out that neither section 1610 nor 1611 would permit an attachment for the purpose of obtaining jurisdiction over a foreign state or its property. For this reason, section 1609 has the effect of precluding attachments as a means for commencing a lawsuit.

Attachment of foreign government property for jurisdictional purposes has been recognized "where under international law a foreign government is not immune from suit", and where the property in the United States is commercial in nature. *Weilamann* v. *Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. N.Y. 1959). Even in such cases, however, it has been recognized that property attached for jurisdictional purposes cannot be retained to satisfy a judgment because, under current practice, the property of a foreign sovereign is immune from execution.

Attachments for jurisdictional purposes have been criticized as involving U.S. courts in litigation not involving any significant U.S. interest or jurisdictional contacts, apart from the fortuitous presence of property in the juris-

diction. Such cases frequently require the application of foreign law to events which occur entirely abroad.

Such attachments can also give rise to serious friction in United States' foreign relations. In some cases, plaintiffs obtain numerous attachments over a variety of foreign government assets found in various parts of the United States. This shotgun approach has caused significant irritation to many foreign governments.

At the same time, one of the fundamental purposes of this bill is to provide a long-arm statute that makes attachment for jurisdictional purposes unnecessary in cases where there is a nexus between the claim and the United States. Claimants will clearly benefit from the expanded methods under the bill for service on a foreign state (sec. 1608), as well as from the certainty that section 1330(b) of the bill confers personal jurisdiction over a foreign state in Federal and State courts as to every claim for which the foreign state is not entitled to immunity. The elimination of attachment as a vehicle for commencing a lawsuit will ease the conduct of foreign relations by the United States and help eliminate the necessity for determinations of claims of sovereign immunity by the State Department.

Section 1610. Exceptions to Immunity from Attachment or Execution

Section 1610 sets forth circumstances under which the property of a foreign state is not immune from attachment or execution to satisfy a judgment. Though the enforcement or judgments against foreign state property remains a somewhat controversial subject in international law, there is a marked trend toward limiting the immunity from execution.

A number of treaties of friendship, commerce and navigation concluded by the United States permit execution of judgments against foreign publicly owned or controlled enterprises (for example, Treaty with Japan, April 2,

1953, art. 18(2), 4 UST 2063, TIAS 2863). The widely ratified Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels, April 10, 1926, 196 L.N.T.S. 199, allows execution of judgments against public vessels engaged in commercial services in the same way as against privately owned vessels. Although not a party to this treaty, the United States follows a policy of not claiming immunity for its publicly-owned merchant vessels, both domestically, 46 U.S.C. 742, 781, and abroad, 46 U.S.C. 747; 2 Hackworth, Digest of International Law, 438-39 (1941). Articles 20 and 21 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 UST 1606, TIAS 5639, to which the United States is a party, recognize the liability to execution under appropriate circumstances of state-owned vessels used in commercial service.

However, the traditional view in the United States concerning execution has been that the property of foreign states is absolutely immune from execution. *Dexter and Carpenter, Inc.* v. *Kunglig Jarnvagsstyrelsen,* 43 F. 2d 705 (2d Cir. 1930). Even after the "Tate Letter" of 1952, this continued to be the position of the Department of State and of the courts. See, *Weilamann* v. *Chase Manhattan Bank,* 21 Misc. 2d 1086, 192 N.Y.S. 2d 469, 473 (Sup. Ct. N.Y. 1959). Sections 1610(a) and (b) are intended to modify this rule by partially lowering the barrier of immunity from execution, so as to make this immunity conform more closely with the provisions on jurisdictional immunity in the bill.

(a) *Execution Against Property of Foreign States.* Section 1610(a) relates to execution against property of a foreign state, including a political subdivision, agency, or instrumentality of a foreign state. The term "attachment in aid of execution" is intended to include attachments, garnishments, and supplemental proceedings available under applicable Federal or State law to obtain satisfaction of a judgment. See rule 69, F.R. Civ. P. The prop-

erty in question must be used for a commercial activity in the United States. If so, attachment in aid of execution, and execution, upon judgments entered by Federal or State courts against the foreign state would be permitted in any of the circumstances set forth in paragraphs (1)-(5) of section 1610(a).

Paragraph (1) relates to explicit and implied waivers, and is governed by the same principles that apply to waivers of immunity from jurisdiction under section 1605 (a)(1) of the bill. A foreign state may have waived its immunity from execution, *inter alia,* by the provisions of a treaty, a contract, an official statement, or certain steps taken by the foreign state in the proceedings leading to judgment or to execution. As in section 1605(a)(1), a waiver on behalf of an agency or instrumentality of a foreign state may be made either by the agency or instrumentality or by the foreign state itself.

Paragraph (2) of section 1610(a) denies immunity from execution against property used by a foreign state for a commercial activity in the United States, provided that the commercial activity gave rise to the claim upon which the judgment is based. Included would be commercial activities encompassed by section 1605(a)(2). The provision also includes a commercial activity giving rise to a claim with respect to which the foreign state has waived immunity under section 1605(a)(1). In addition, it includes a commercial activity which gave rise to a maritime lien with respect to which an admiralty suit was brought under section 1605(b). One could, of course, execute against commercial property other than a vessel or cargo which is the subject of a suit under section 1605(b), provided that the property was used in the same commercial activity upon which the maritime lien was based.

The language "is or was used" in paragraph (2) contemplates a situation where property may be transferred from the commercial activity which is the subject of the

suit in an effort to avoid the process of the court. This language, however, does not bear on the question of whether particular property is to be deemed property of the entity against which the judgment was obtained. The courts will have to determine whether property "in the custody of" an agency or instrumentality is property "of" the agency or instrumentality, whether property held by one agency should be deemed to be property of another, whether property held by an agency is property of the foreign state. See *Prelude Corp.* v. *Owners of F/V Atlantic*, 1971, A.M.C. 2651 (N.D. Calif.); *American Hawaiian Ventures* v. *M.V.J. Latuharhary*, 257 F. Supp. 622, 626 (D.N.J. 1966).

Paragraph (3) would deny immunity from execution against property of a foreign state which is used for a commercial activity in the United States and which has been taken in violation of international law or has been exchanged for property taken in violation of international law. See the analysis to section 1605 (a)(3).

Paragraph (4) would deny immunity from execution against property of a foreign state which is used for a commercial activity in the United States and is either acquired by succession or gift or is immovable. Specifically exempted are diplomatic and consular missions and the residences of the chiefs of such missions. This exemption applies to all of the situations encompassed by sections 1610 (a) and (b); embassies and related buildings could not be deemed to be property used for a "commercial" activity as required by section 1610(a); also, since such buildings are those of the foreign state itself, they could not be property of an agency or instrumentality engaged in a commercial activity in the United States within the meaning of section 1610(b).

Paragraph (5) of section 1610(a) would deny immunity with respect to obligations owed to a foreign state under a policy of liability insurance. Such obligations would after judgment be treated as property of the foreign

state subject to garnishment or related remedies in aid or in place of execution. The availability of such remedies would, of course, be governed by applicable State or Federal law. Paragraph (5) is intended to facilitate recovery by individuals who may be injured in accidents, including those involving vehicles operated by a foreign state or by its officials, or employees acting within the scope of their authority.

(b) *Additional Execution Against Agencies and Instrumentalities Engaged in Commercial Activity in the United States.*—Section 1610(b) provides for execution against the property of agencies or instrumentalities of a foreign state in circumstances additional to those provided in section 1610(a). However, the agency or instrumentality must be engaged in a commercial activity in the United States. If so, the plaintiff may obtain an attachment in aid of execution or execution against *any* property, commercial and noncommercial, of the agency or instrumentality, but only in the circumstances set forth in paragraphs (1) and (2).

Paragraph (1) denies immunity from execution against any property of an agency or instrumentality engaged in a commercial activity in the United States, where the agency or instrumentality has waived its immunity from execution. See the analysis to paragraph (1) of section 1610(a).

Paragraph (2) of section 1610(b) denies immunity from execution against any property of an agency or instrumentality engaged in a commercial activity in the United States in order to satisfy a judgment relating to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a), (2), (3) or (5), or 1605(b). Property will be subject to execution irrespective of whether the property was used for the same commercial or other activity upon which the claim giving rise to the judgment was based.

Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. See *Prelude Corp.* v. *Owners of F/V Atlantic*, 1971 A.M.C. 2651 (N.D. Calif.). There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary. However, a court might find that property held by one agency is really the property of another. See the analysis to section 1610(a)(2).

(c) *Necessity of court order following reasonable notice.*—Section 1610(c) prohibits attachment or execution under sections 1610(a) and (b) unless the court has issued an order for such attachment and execution. In some jurisdictions in the United States, attachment and execution to satisfy a judgment may be had simply by applying to a clerk or to a local sheriff. This would not afford sufficient protection to a foreign state. This subsection contemplates that the courts will exercise their discretion in permitting execution. Prior to ordering attachment and execution, the court must determine that a reasonable period of time has elapsed following the entry of judgment, or in cases of a default judgment, since notice of the judgment was given to the foreign state under section 1608(e). In determining whether the period has been reasonable, the courts should take into account procedures, including legislation, that may be necessary for payment of a judgment by a foreign state, which may take several months; representations by the foreign state of steps being taken to satisfy the judgment; or any steps being taken to satisfy the judgment; or evidence that the foreign state is about to remove assets from the jurisdiction to frustrate satisfaction of the judgment.

(d) *Attachments upon explicit waiver to secure satisfaction of a judgment.*—Section 1610(d) relates to attachment against the property of a foreign state, or of a political subdivision, agency or instrumentality of a foreign state, prior to the entry of judgment or prior to the lapse of the "reasonable period of time" required under section 1610(c). Immunity from attachment will be denied only if the foreign state, political subdivision, agency or instrumentality has explicitly waived its immunity from attachment prior to judgment, and only if the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state and not to secure jurisdiction. This subsection provides, in cases where there has been an explicit waiver, a provisional remedy, for example to prevent assets from being dissipated or removed from the jurisdiction in order to frustrate satisfaction of a judgment.

Section 1611. Certain types of property immune from execution

Section 1611 exempts certain types of property from the immunity provisions of section 1610 relating to attachment and execution.

(a) *Property held by international organizations.*—Section 1611(a) precludes attachment and execution against funds and other property of certain international organizations designated by the President pursuant to the International Organizations Immunities Act, 22 U.S.C. 288, *et seq.*, to carry out their functions from their offices located in the United States without hindrance by private claimants seeking to attach the payment of funds to a foreign state; such attachments would also violate the immunities accorded to such international institutions. See also article 9, section 3 of the Articles of Agreement of the Internatioial Monetary Fund, TIAS 1501, 60 Stat. 1401. International organizations covered by this provision would include, *inter alia,* the International Monetary

Fund and the World Bank. The reference to "international organizations" in this subsection is not intended to restrict any immunity accorded to such international organizations under any other law or international agreement.

(b) *Central bank funds and military property.*—Section 1611(b)(1) provides for the immunity of central bank funds from attachment or execution. It applies to funds of a foreign central bank or monetary authority which are deposited in the United States and "held" for the bank's or authority's "own account"—i.e., funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states. If execution could be levied on such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relations problems.

Section 1611(b)(2) provides immunity from attachment and execution for property which is, or is intended to be, used in connection with a military activity and which fulfills either of two conditions: the property is either (A) of a military character or (B) under the control of a military authority or defense agency. Under the first condition, property is of a military character if it consists of equipment in the broad sense—such as weapons, ammunition, military transport, warships, tanks, communications equipment. Both the character and the function of the property must be military. The purpose of this condition is to avoid frustration of United States foreign policy in connection with purchases of military equipment and supplies in the United States by foreign governments.

The second condition is intended to protect other military property, such as food, clothing, fuel and office equip-

ment which, although not of a military character, is essential to military operations. "Control" is intended to include authority over disposition and use in addition to physical control, and a "defense agency" is intended to include civilian defense organizations comparable to the Defense Supply Agency in the United States. Each condition is subject to the overall condition that property will be immune only if its present or future use is military (e.g., surplus military equipment withdrawn from military use would not be immune). Both conditions will avoid the possibility that a foreign state might permit execution on military property of the United States abroad under a reciprocal application of the act.

SEC. 5. VENUE

This section amends 28 U.S.C. § 1391, which deals with venue generally. Under the new subsection (f), there are four express provisions for venue in civil actions brought against foreign states, political subdivisions or their agencies or instrumentalities.

(1) The action may be brought in the judicial district wherein a substantial part of the events or omissions giving rise to the claim occurred." This provision is analogous to 28 U.S.C. § 1391(e), which allows an action against the United States to be brought, *inter alia*, in any judicial district in which "the cause of action arose." The test adopted, however, is the newer test recommended by the American Law Institute and incorporated in S. 1876, 92d Congress, 1st session, which does not imply that there is only one such district applicable in each case. In cases under section 1605(a)(2), involving a commercial activity abroad that causes a direct effect in the United States, venue would exist wherever the direct effect generated "a substantial part of the events" giving rise to the claim.

In cases where property or rights in property are involved, the action may be brought in the judicial district

in which "a substantial part of the property that is the subject of the action is situated." No hardship will be caused to the foreign state if it is subject to suit where it has chosen to place the property that gives rise to the dispute.

(2) If the action is a suit in admiralty to enforce a maritime lien against a vessel or cargo of a foreign state, and if the action is brought under the new section 1605(b) in this bill, the action may be brought in the judicial district in which the vessel or cargo is situated at the time notice is delivered pursuant to section 1605(b)(1).

(3) If the action is brought against an agency or instrumentality of a foreign state, as defined in the new section 1603(b) in the bill, it may be brought in the judicial district where the agency or instrumentality is licensed to do business or is doing business. This provision is based on 28 U.S.C. § 1391(c).

(4) If the action is brought against a foreign state or political subdivision, it may be brought in the U.S. District Court for the District of Columbia. It is in the District of Columbia that foreign states have diplomatic representatives and where it may be easiest for them to defend. New subsection (f) would, of course, not apply to entities that are owned by a foreign state and are also citizens of a state of the United States as defined in 28 U.S.C. 1332(c) and (d). For purposes of this bill, such entities are not agencies or instrumentalities of a foreign state. (See the analysis to sec. 1603(b).)

As with other provisions in 28 U.S.C. 1391, venue in any court could be waived by a foreign state, such as by failing to object to improper venue in a timely manner. (See rule 12(h), F.R. Civ. P.)

SEC. 6. REMOVAL OF CASES FROM STATE COURTS

The bill adds a new provision to 28 U.S.C. 1441 to provide for removal to a Federal district court of civil

actions brought in the courts of the States against a foreign state or a political subdivision, agency or instrumentality of a foreign state. In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts. New subsection (d) of section 1441 permits the removal of any such action at the discretion of the foreign state, even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the State in which the action has been brought.

As with other removal provisions, a petition for removal must be filed with the appropriate district court in a timely manner. (28 U.S.C. 1446.) However, in view of the 60-day period provided in section 1608(c) in the bill and in view of the bill's preference that actions involving foreign states be tried in federal courts, the time limitations for filing a petition of removal under 28 U.S.C. 1446 may be extended "at any time" for good cause shown.

Upon removal, the action would be heard and tried by the appropriate district court sitting without a jury. (*Cf.* 28 U.S.C. 2402, precluding jury trials in suits against the United States.) Thus, one effect of removing an action under the new section 1441(d) will be to extinguish a demand for a jury trial made in the state court. (*Cf.* rule 81(c), F.R. Civ. P.) Because the judicial power of the United States specifically encompasses actions "between a State, or the Citizens thereof, and foreign States" (U.S. Constitution, art. III, sec. 2, cl. 1), this preemption of State court procedures in cases involving foreign sovereigns is clearly constitutional.

This section, again, would not apply to entities owned by a foreign state which are citizens of a State of the United States as defined in 28 U.S.C. 1332 (c) and (d), or created under the laws of a third country.

SEC. 7. SEVERABILITY OF PROVISIONS

This action provides that if a portion of the act or any application of the act should be found invalid for any reason, such invalidity would not affect any other provision or application of the act.

SEC. 8. EFFECTIVE DATE

This section establishes that the effective date of the act shall be 90 days after it becomes law. A 90-day period is deemed necessary in order to give adequate notice of the act and its detailed provisions to all foreign states.

STATEMENTS UNDER CLAUSE 2(1)(2)(B), CLAUSE 2 (1)(3) AND CLAUSE 2(1)(4) OF RULE XI AND CLAUSE 7(a)(1) OF RULE XIII OF THE HOUSE OF REPRESENTATIVES

COMMITTEE VOTE

(Rule XI 2(1)(2)(B))

On September 9, 1976, the Full Committee on the Judiciary approved the bill H.R. 11315 by voice vote.

COST

(Rule XIII 7(a)(1))

The enactment of this bill will not require any new or additional authorization or appropriation of funds. Indeed, the enactment of this bill will result in a net saving, in an undetermined amount, in that the Department of State will no longer have to undertake a consideration of diplomatic requests for sovereign immunity, and the Department of Justice will not be required to appear in the courts in support of any suggestions of immunity that are filed pursuant to the Department of State's sovereign immunity determinations.

OVERSIGHT STATEMENT

(Rule XI 2(1)(3)(A))

The Subcommittee on Administrative Law and Governmental Relations of this committee exercises the committee's oversight responsibility with reference matters involving the immunity of foreign states, in accordance with Rule VI(b) of the Rules of the Committee on the Judiciary. The favorable consideration of this bill was recommended by that subcommittee and the committee has determined that legislation should be enacted as set forth in this bill.

BUDGET STATEMENT

(Rule XI 2(1)(3)(B))

As has been indicated in the committee statement as to cost made pursuant to Rule XIII (7)(a)(1), the bill will not require any new or additional authorization or appropriation of funds. The bill does not involve new budget authority nor does it require new or increased tax expenditures as contemplated by Clause 2(1)(3)(B) of Rule XI.

ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE

(Rule XI 2(1)(3)(C))

The estimate received from the Director of the Congressional Budget Office is as follows:

CONGRESS OF THE UNITED STATES,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., July 6, 1976.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CAIRMAN: In response to your letter of June 10, 1976 and pursuant to section 403 of the Congressional Budget Act, the Congressional Budget Office

has analyzed the costs associated with H.R. 11315, the "Foreign Sovereign Immunities Act of 1976." This legislation is estimated to have no budgetary impact.

Should the committee so desire, we would be pleased to provide additional assistance on this and future legislation.

Sincerely,

ALICE M. RIVLIN,
Director.

OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS

(Rule XI 2(1)(3)(D))

No findings or recommendations of the Committee on Government Operations were received as referred to in subdivision (D) of clause 2(1)(3) of House Rule XI.

INFLATIONARY IMPACT

(Rule XI 2(1)(3))

In compliance with clause 2(1)(4) of House Rule XI it is stated that this legislation will have no inflationary impact on prices and costs in the operation of the national economy.

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[The executive communication from the Departments of State and Justice is as follows:]

DEPARTMENT OF STATE,
Washington, D.C., October 31, 1975.

HON. CARL O. ALBERT,
Speaker of the House of Representatives.

DEAR MR. SPEAKER: The Department of State and Department of Justice submit for your consideration and appropriate reference the enclosed draft bill, entitled "To define the circumstances in which foreign states are im-

mune from the jurisdiction of U.S. courts and in which execution may not be levied on their assets, and for other purposes." This is a proposed revision of the draft bill which was submitted in a letter (enclosed) to you dated January 16, 1973, and subsequently introduced by Chairman Peter W. Rodino, Jr., and Congressman Edward Hutchinson as H.R. 3493. A revised section-by-section analysis explaining the provisions of the bill in some detail is also enclosed. A hearing was held on H.R. 3493 before the Subcommittee on Claims and Governmental Relations of the Committee of the Judiciary in the House of Representatives in the 1st session of the 93d Congress on June 7, 1973.

The broad purposes of this legislation—to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation—remain the same. To this end the revised bill, like its predecessor, would entrust the resolution of questions of sovereign immunity to the judicial branch of Government. The statute would codify and refine the "restrictive theory" of sovereign immunity which has guided United States practice with respect to jurisdiction originally set forth in the letter of May 19, 1952, from the Acting Legal Advisor, Jack B. Tate, to the Acting Attorney General, Philip B. Perlman. It would also replace the absolute immunity now accorded foreign states from execution of judgment with an immunity from execution conforming more closely to the restrictive theory of immunity from jurisdiction. The measure also includes provisions for service of process, venue, and jurisdiction in cases against foreign states which would make it unnecessary to attach the assets of foreign states for purposes of jurisdiction.

Numerous technical changes have been made in the bill on the basis of the hearing in the House of Representatives, commentaries in a number of legal journals, and extensive discussions which have been held with members of the bar as well as the reports and recommenda-

tions of committees of several bar associations. A number of these technical revisions are important, but none of them alters the basic concept of the legislation as originally submitted.

The most important changes include (1) further definition of "commercial activity carried on in the United States by a foreign state" and "public debt" in section 1603; (2) clarification of the limitations of immunity in tort actions (sec. 1605(5)), in respect of counterclaims (sec. 1607), and in case of execution of judgment (sec. 1610); and (3) substantial revision of section 1608 relating to service of process to conform with article XXII of the Convention on Diplomatic Relations, signed at Vienna April 18, 1961, and with the Federal Rules of Civil Procedure.

In addition, important new provisions have been added to preserve the jurisdiction of the courts of the United States in cases in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of a foreign state (sec. 1605(b)), and to avoid interference with disbursements to foreign states by certain international organizations located in the United States (sec. 1611(a)). These and other changes are discussed in the enclosed analysis.

The Departments of State and Justice believe that this revised draft bill is worthy of and will receive the support of the bar and would welcome hearings before the appropriate committees of the House to consider this measure as soon as possible.

The Office of Management and Budget has advised that there is no objection to the enactment of this legislation from the standpoint of the administration's program.

Sincerely,

ROBERT S. INGERSOLL,
Deputy Secretary of State.
HAROLD R. TYLER, JR.,
Deputy Attorney General.